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In the Supreme Court of the United States

DAVID ALLEN SATTAZAHN, PETITIONER

v.

COMMONWEALTH OF PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

CAPITAL CASE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause precludes imposing a sentence of death in a retrial, when, in the initial trial, a sentence of life imprisonment was imposed as a matter of law after the capital sentencing jury deadlocked and was unable to reach a verdict.

2. Whether the Due Process Clause prohibits imposing a sentence of death on a defendant who, after being sentenced to life imprisonment as a matter of law following the sentencing jury's inability to reach a verdict, obtained reversal of his conviction on appeal and is convicted again of capital murder in a retrial.

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INTEREST OF THE UNITED STATES

This case presents the questions whether the Double Jeopardy Clause or the Due Process Clause precludes the imposition of a capital sentence when, in an initial trial, the capital sentencing jury is unable to reach a verdict on the appropriate sentence, the judge imposes a life sentence as a matter of law, and the defendant obtains reversal of his underlying conviction on appeal and is convicted again on retrial. The federal statutes governing administration of the death sentence are similar in relevant respects to the Pennsylvania statute at issue in this case in requiring the trial court to enter a non-capital sentence when the jury is unable to reach a unanimous verdict on the appropriate sentence. See 18 U.S.C. 3593(e), 3594; 21 U.S.C. 848(k)-(*l*). Because both questions presented in this case could arise

under the federal provisions for capital sentencing, the United States has a significant interest in the Court's disposition of this case.

CONSTITUTIONAL PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides: "No person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb."

The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides: "No State shall * * * deprive any person of life, liberty, or property, without due process of law."

STATEMENT

1. On April 12, 1987, petitioner and an accomplice, Jeffrey Hammer, set out to rob Richard Boyer, who was the manager of a local family restaurant. They chose that date because it fell on a Sunday, and, based on their observations, the restaurant appeared to conduct the most business on Sundays. Petitioner was carrying a .22 caliber pistol, and Hammer was carrying a .41 caliber revolver. They hid in a wooded area behind the restaurant until it closed. When Boyer emerged from the restaurant, they confronted him in the parking lot. With their guns drawn, they attempted to rob him of the bank deposit bag that contained the restaurant's receipts for the day. Instead of handing over the deposit bag, Boyer threw it towards the restaurant and then again towards the roof. Petitioner told Boyer to retrieve the bag, but Boyer refused and attempted to run away. Petitioner and Hammer fired their guns, killing Boyer. They then grabbed the bank deposit bag and fled. J.A. 91-92.

An autopsy revealed that Boyer had suffered two gunshot wounds in the lower back, and one each in the left shoulder, lower face, and back of the head, all of which were consistent with wounds caused by a .22 caliber bullet. Petitioner's gun

was identified as the one that had fired the slugs recovered from Boyer's body and the cartridges found at the scene. J.A. 94-95.

2. a. Before trial, the Commonwealth filed a notice of its intention to seek a sentence of death against petitioner. Br. in Opp. 2. On May 10, 1991, a jury found petitioner guilty of first, second, and third degree murder, two counts of aggravated assault, possession of an instrument of crime, carrying a firearm without a license, and criminal conspiracy. The case then proceeded to the penalty phase. J.A. 92.

The Commonwealth presented one aggravating circumstance—that petitioner committed the killing while perpetrating a felony. See 42 Pa. Cons. Stat. Ann. § 9711(d)(6) (West 1998). Petitioner offered as mitigating circumstances his lack of a significant history of criminal conduct and his age at the time of the crime. J.A. 92. The court instructed the jury in accordance with Pennsylvania law that, before imposing a sentence of death, it was required unanimously to find the existence of at least one aggravating circumstance beyond a reasonable doubt, and also to find either that there were no mitigating circumstances or that any mitigating circumstances failed to outweigh the aggravating circumstances. J.A. 16-17. The court informed the jury that its verdict "is not merely a recommendation," but "actually fixes the punishment at death or life imprisonment." J.A. 19. The court emphasized to the jury that its "verdict, whether it be death or life imprisonment, must be unanimous; it must be the verdict of each and every one of you." J.A. 19-20. The jury also was informed that, if it were "unable to agree on a verdict" and were "hopelessly deadlocked," the court would be required to sentence petitioner to life imprisonment. J.A. 18.[1]

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[1] See 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(v) (West 1998) ("the court may, in its discretion, discharge the jury if it is of the opinion that further

After deliberating for three and one-half hours, the jury informed the court that it was deadlocked. Petitioner moved immediately for discharge of the jury and entry of a sentence of life imprisonment. The court refused to discharge the jury until it had an opportunity to examine whether additional deliberations would be productive. The jurors, in response to the court's questions, indicated that further deliberations would not result in a unanimous verdict. The court then discharged the jury, finding that the jury was "unable to find unanimously for either sentence of death or life imprisonment." The court added that, because of the jury's failure to reach a verdict, the court would sentence petitioner to life imprisonment at the time of formal sentencing. J.A. 22-24.

b. Petitioner appealed his convictions to the Pennsylvania Superior Court. On July 30, 1993, the Superior Court dismissed his convictions for criminal conspiracy and aggravated assault based on insufficiency of the evidence, and remanded for a new trial on the remaining charges because of an instructional error. J.A. 92-93; Br. in Opp. 3-4. While his appeal was pending in the Superior Court, petitioner pleaded guilty in various Pennsylvania jurisdictions to a number of unrelated offenses, including third degree murder, several burglaries, and robbery. J.A. 93 n.2.

3. a. On March 9, 1995, in preparation for petitioner's retrial, the Commonwealth again filed notice of its intention to seek the death penalty. This time, the Commonwealth relied not only on the sole aggravating circumstance it had presented in the initial trial, that petitioner committed the killing while perpetrating a felony, 42 Pa. Cons. Stat. Ann. § 9711(d)(6) (West 1998), but also on a new aggravating circumstance arising from petitioner's intervening convictions:

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deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment").

that petitioner had a significant history of felony convictions involving the use of violence, § 9711(d)(9). Petitioner moved to prevent the Commonwealth from seeking the death penalty, but his motion was denied. J.A. 93.

On January 22, 1999, a jury found petitioner guilty of first degree murder. In the penalty phase, the jury sentenced petitioner to death by a unanimous verdict. J.A. 86, 91.

b. The Pennsylvania Superior Court affirmed. J.A. 73-81. The court rejected petitioner's contention under the Double Jeopardy Clause that his sentence of life imprisonment in his initial trial precluded imposition of a sentence of death on retrial. The court explained that the Supreme Court of Pennsylvania, in *Commonwealth* v. *Martorano*, 634 A.2d 1063 (1993), had held that a life sentence imposed by operation of law following a jury deadlock, in contrast to a life sentence imposed by a unanimous jury verdict, raises no double jeopardy bar. J.A. 76-77. The court also rejected petitioner's argument that exposing him to a sentence of death on retrial infringed his state law right of appeal. J.A. 77-78.

c. The Supreme Court of Pennsylvania affirmed. *Commonwealth* v. *Sattazahn*, 763 A.2d 359 (2000), *reprinted in* J.A. 91-109. The court first addressed petitioner's claim under the Double Jeopardy Clause. The court acknowledged that, under this Court's decision in *Bullington* v. *Missouri*, 451 U.S. 430 (1981), a capital sentencing jury's verdict of life imprisonment amounts to an "acquittal" of the death penalty, thus raising a double jeopardy bar against imposing the death sentence if the defendant obtains a retrial. But the court adhered to its decision in *Martorano*, *supra*, which distinguished between a jury verdict of life imprisonment, as was involved in *Bullington*, and a default sentence of life imprisonment imposed in the event of a jury deadlock, as was involved in this case. The latter situation does not involve an "acquittal" of the death sentence, the court ex-

plained, because the jury makes no finding "regarding an appropriate penalty" or "the existence of any aggravating or mitigating circumstances." J.A. 103 (quoting *Martorano*, 634 A.2d at 1070). The court added that, while a hung jury results in the trial court's imposing a life sentence by operation of law, the trial court's action is not an acquittal because the "judge makes no findings and resolves no factual matter." *Ibid.* (quoting *Martorano*, 634 A.2d at 1070).

Next, the court rejected petitioner's contention that permitting the Commonwealth to seek a sentence of death on retrial infringed his state law right of appeal. The court noted that "Pennsylvania's constitutional analysis of these issues is the same as the federal approach." J.A. 105. The court explained that this Court, in *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973), had "rejected the claim that a harsher sentence on retrial has a chilling effect on the defendant's right to appeal * * * his conviction." J.A. 106.[2]

SUMMARY OF ARGUMENT

I. The imposition of a sentence of death against petitioner after his retrial did not violate the Double Jeopardy Clause. The power to retry a defendant who has obtained reversal of his initial conviction generally embraces the authority to resentence him if he is re-convicted. That is because the defendant, by gaining a reversal of his conviction, has "wiped the slate clean" and is subject to any sentence authorized for his offense if he is again convicted on retrial. See *North Carolina* v. *Pearce*, 395 U.S. 711, 719-721 (1969). This Court established that principle in *Stroud* v.

[2] The dissent disagreed with the majority only on petitioner's claim that his state law right of appeal had been infringed, and its disagreement was only as a matter of state law. The dissent, concerned about a chilling effect on the right of appeal, believed that the court in its "supervisory role respecting the administration of capital cases in Pennsylvania" should have barred the imposition of a sentence of death on retrial. J.A. 108.

United States, 251 U.S. 15 (1919), which upheld the imposition of a sentence of death in the retrial of a defendant who had been sentenced to life imprisonment in his initial trial.

The "clean slate" rule established in *Stroud*, rather than the narrow exception recognized in *Bullington* v. *Missouri*, 451 U.S. 430 (1981), governs here. In *Bullington*, the jury in effect "acquitted" the defendant of the death sentence by reaching a unanimous verdict for life imprisonment, rather than death, based on the facts of his offense. That trial-like "acquittal" barred the imposition of the death sentence on retrial. Petitioner's life sentence cannot be analogized to an "acquittal," because neither the jury nor the trial court determined that the circumstances of his offense fail to warrant a sentence of death. The jury, unlike the one in *Bullington*, was unable to reach a unanimous verdict. And the trial court's mandatory imposition of a life sentence by operation of law involved no examination of the facts or the evidence.

Although a jury deadlock results in the same outcome under state law as a unanimous jury "acquittal"—the imposition of a life sentence—that is not significant under the Double Jeopardy Clause. The imposition of a life sentence rather than a sentence of death is not, without more, an "acquittal" of the death penalty for double jeopardy purposes. An "acquittal" requires a factual determination that the evidence fails to justify a sentence of death, and no such determination was made in this case. Nor is it significant that Pennsylvania, when there is a hung jury, has elected to impose a life sentence instead of impaneling a new jury and conducting a new sentencing hearing. Pennsylvania need not exercise its constitutional authority to convene another sentencing jury after a jury deadlock in order to preserve its authority to resentence in the event of a retrial and reconviction. This Court's decisions make clear, moreover,

that a unanimous jury verdict is distinct from a jury deadlock, even if both result in a life sentence. See *Lowenfield* v. *Phelps*, 484 U.S. 231, 238 (1988).

II. The Due Process Clause imposes no independent prohibition against sentencing petitioner to death on retrial. Petitioner contends that the life sentence imposed in his initial trial created a permanent entitlement under the Due Process Clause to avoid resentencing for the offense, even after reversal of the conviction on appeal and re-conviction in a new trial. That is incorrect.

Pennsylvania law creates no such entitlement. The relevant capital sentencing statutes prescribe the conduct of a new sentencing hearing after every capital conviction, whether in an initial trial or a retrial. The Due Process Clause does not prevent Pennsylvania from resentencing in a retrial. This Court has held that the imposition of a more severe sentence on retrial after a successful appeal does not violate the Due Process Clause. The lone exception to that rule, which forbids increasing the sentence on retrial as a penalty for the defendant's appeal of his initial conviction, has no application here. The Court held in *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973), that concerns about vindictiveness do not arise when sentencing on retrial is conducted by a jury, especially because the jury—as was the case here—often will have no knowledge of the prior sentence.

Far from implicating concerns about vindictiveness, Pennsylvania's decision to permit a new capital sentencing hearing after a re-conviction, but not after an initial hung jury, is a rational choice. First, Pennsylvania may reasonably decide that the State should not bear the burden of empaneling a new jury and retrying the sentencing phase unless a successful appeal makes it necessary to retry the entire case. Second, Pennsylvania may reasonably conclude that a new sentencing jury should have the opportunity to consider all available sentencing options based on any

intervening information that has come to light since the initial trial. Those rationales satisfy the Due Process Clause.

ARGUMENT

I. THE IMPOSITION OF A SENTENCE OF LIFE IMPRISONMENT AS A MATTER OF LAW WHEN THE JURY IN A CAPITAL CASE IS UNABLE TO REACH A SENTENCING VERDICT DOES NOT CONSTITUTE AN "ACQUITTAL" OF THE DEATH PENALTY FOR DOUBLE JEOPARDY PURPOSES

Under the Double Jeopardy Clause, an acquittal of a substantive criminal charge finally disposes of the case and bars retrial. See, *e.g.*, *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1972). Because the Double Jeopardy Clause historically has not been applied to sentencing decisions, however, the imposition of a particular sentence generally is not considered an "acquittal" of a greater sentence. See *Monge* v. *California*, 524 U.S. 721, 728-729 (1998); *United States* v. *DiFrancesco*, 449 U.S. 117, 129-130 (1980). The Court recognized a narrow exception to that principle in *Bullington* v. *Missouri*, 451 U.S. 430 (1981). *Bullington* holds that, if the jury in the penalty phase of a bifurcated capital trial in effect "acquits" the defendant of a death sentence by choosing to sentence him to life imprisonment, the defendant cannot, if he obtains reversal of his conviction, be sentenced to death in a retrial.

The issue in this case is whether the *Bullington* exception applies when a capital defendant is sentenced to life imprisonment, not, as in *Bullington*, by a unanimous jury verdict, but instead by operation of law when the jury is unable to reach agreement on the appropriate sentence. In the absence of a factual determination, based on the particular circumstances of the case, that a sentence of death is not warranted for the offense, there is no "acquittal" under

Bullington. Because neither the jury nor the trial court made that determination in this case, petitioner's double jeopardy claim should be rejected.

A. The Double Jeopardy Clause Generally Imposes No Limits On The Sentence That May Be Imposed In The Retrial Of A Defendant Who Obtains Reversal Of His Initial Conviction

"Historically," this Court has "found double jeopardy protections inapplicable to sentencing proceedings, because the determinations at issue do not place a defendant in jeopardy for an 'offense.'" *Monge*, 524 U.S. at 728 (citations omitted). As is especially relevant here, the "imposition of a particular sentence usually is not regarded as an 'acquittal' of any more severe sentence that could have been imposed." *Bullington*, 451 U.S. at 438; see *Monge*, 524 U.S. at 729; *DiFrancesco*, 449 U.S. at 134.

For that reason, a defendant who is retried after obtaining reversal of his conviction on appeal ordinarily has no double jeopardy claim against the imposition of a more severe sentence if he is again convicted. See *Monge*, 524 U.S. at 729; *DiFrancesco*, 449 U.S. at 134-135; *Pearce*, 395 U.S. at 719-721. Instead, the "corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction." *Pearce*, 395 U.S. at 720. The "rationale for this 'well-established part of our constitutional jurisprudence,'" the Court has explained, "rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." *Id.* at 720-721 (quoting *United States* v. *Tateo*, 377 U.S. 463, 465 (1964)). The defendant, after "wiping the slate clean," is subject to any sentence authorized for his offense if he is re-convicted following a new trial. *Id.* at 721.

The Court has traced the "clean slate" principle to *Stroud* v. *United States*, 251 U.S. 15 (1919), see *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 23-24 (1973); *Pearce*, 395 U.S. at 720, and *Stroud* is significant here because it involved a jury's decision in a capital case to sentence the defendant to life imprisonment rather than death. Stroud was found guilty by a jury of first degree murder. The punishment for that offense was set by statute as death, except that the jury could, as it did in Stroud's initial trial, specify in its verdict that the defendant should be sentenced to life imprisonment. *Stroud*, 251 U.S. at 17-18; see *Bullington*, 451 U.S. at 439 n.11. Stroud obtained a reversal of his conviction on appeal, but he was again convicted of first degree murder after a new trial, this time with no specification in the jury's verdict that the sentence of death should not be imposed. 251 U.S. at 18. This Court held unanimously "that the Double Jeopardy Clause * * * did not bar the imposition of the death penalty when Stroud at his new trial was again convicted." *Bullington*, 451 U.S. at 432.[3]

Although changes in this Court's capital jurisprudence have limited *Stroud*'s application, the Court repeatedly has reaffirmed *Stroud*'s general understanding of the Double Jeopardy Clause. See *Monge*, 524 U.S. at 730, 733; *Schiro* v. *Farley*, 510 U.S. 222, 230 (1994); *Bullington*, 451 U.S. at 431-432, 438-439; *Chaffin*, 412 U.S. at 23-24; *Pearce*, 395 U.S. at 720. *Stroud* establishes that the imposition of a life sentence raises no double jeopardy bar against imposing a sentence of death upon a re-conviction, unless, as *Bullington* later held, the life sentence can be analogized to an "acquittal."

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[3] In *Stroud*, the jury was given no substantive standards or guidance by which to determine the appropriate sentence, and was required to find no additional facts in order to sentence the defendant to death. See *Bullington*, 451 U.S. at 439 n.11, 441 n.15; see also *Monge*, 524 U.S. at 733.

B. *Bullington* Bars A Sentence Of Death On Retrial Only If The Defendant Was "Acquitted On The Merits" Of The Death Penalty In His Initial Trial

In *Bullington*, the Court accepted the "clean slate" rule established in *Stroud* and later decisions, under which the Double Jeopardy Clause generally imposes no constraints on the sentence imposed in a retrial. *Bullington*, 451 U.S. at 442. The Court also accepted the specific conclusion in *Stroud* that the jury's decision in favor of a sentence of life imprisonment in Stroud's initial trial did not preclude imposing a sentence of death in his retrial. See *id.* at 431-432. The question in *Bullington* was whether the same conclusion should obtain when the jury's decision to impose a life sentence is made in a separate penalty proceeding in which—as in many capital sentencing statutes enacted after *Furman* v. *Georgia*, 408 U.S. 238 (1972)—the jury is given a choice between two specific sentencing verdicts, the jury's decision is guided by substantive standards, and the prosecution is required to prove the existence of additional facts beyond a reasonable doubt. See *Bullington*, 451 U.S. at 432, 436-437, 446.

In those circumstances, the Court held, the jury's verdict in favor of a life sentence raises a double jeopardy bar against imposing a sentence of death on retrial. The Court reasoned that, although reversal of a conviction normally wipes the slate clean, reversal on the ground that the evidence was insufficient to convict is treated as an acquittal and prohibits further proceedings. See *Bullington*, 451 U.S. at 442-443 (citing *Burks* v. *United States*, 437 U.S. 1 (1978)). The same exception, the Court concluded, should apply to the unanimous jury verdict in *Bullington* for a life sentence. Because that verdict resulted from "a capital sentencing procedure that resembles a trial on the issue of guilt or innocence," the jury effectively had "acquitted the defendant

of whatever was necessary to impose the death sentence." *Id.* at 444-445 (citation omitted). Accordingly, the "protection afforded by the Double Jeopardy Clause to one acquitted by a jury also is available to him, with respect to the death penalty, at his retrial." *Id.* at 446. The Court held that, when a sentence of life imprisonment amounts to a trial-like "acquittal" of the death penalty, the clean slate rule would not apply. *Ibid.*[4]

Later decisions make clear that "*Bullington* established a 'narrow exception,'" *Monge*, 524 U.S. at 730, which arises only when the imposition of a life sentence amounts to an "acquittal on the merits" on whether a sentence of death is appropriate for the offense. In *Arizona* v. *Rumsey*, 467 U.S. 203 (1984), the trial judge, who under Arizona law is the sentencer in a capital case, entered a sentence of life imprisonment on finding that the State had failed to establish the existence of any aggravating circumstances. This Court explained that the "double jeopardy principle" that governed was "the same as that invoked in *Bullington*: an *acquittal on the merits* by the sole decisionmaker in the proceeding is final and bars retrial on the same charge." *Id.* at 211 (emphasis added). The trial court's decision in *Rumsey* to impose a sentence of life imprisonment "was undoubtedly an acquittal on the merits" on "whether death was the appropriate punishment," because it was based on findings of fact denying the existence of any aggravating circumstances. *Ibid.* "That judgment, based on findings sufficient to establish legal entitlement to the life sentence," prohibited a "retrial of the appropriateness of the death penalty." *Ibid.*

In *Poland* v. *Arizona*, 476 U.S. 147 (1986), the Court again stressed that *Bullington* requires an acquittal on the merits

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[4] The Court subsequently held in *Monge* v. *California*, 524 U.S. at 730-734, that *Bullington*'s exception to the clean slate rule does not extend beyond the capital sentencing context.

of the death penalty. There, the trial judge sentenced the defendant to death based on one aggravating circumstance. The Arizona Supreme Court found the evidence insufficient to support that aggravating circumstance, but ordered a new sentencing hearing on remand because the trial judge had erred in his interpretation of a different aggravating circumstance. See *id.* at 149-150. This Court held that *Bullington* did not bar a new sentencing hearing on remand, because neither the trial judge nor the reviewing court had "acquitted" the defendant of the death penalty. The trial judge had imposed the death penalty, and the reviewing court had held that it might be warranted based on a different aggravating circumstance. *Id.* at 154. Although the reviewing court had found the evidence insufficient to support the particular aggravating circumstance relied on by the trial judge, *Bullington*, the Court explained, requires an acquittal on whether "*the death penalty is appropriate.*" *Id.* at 155. A contrary understanding "would push the analogy on which *Bullington* is based past the breaking point." *Id.* at 156. In the case before it, no court had found "the evidence * * * legally insufficient to justify imposition of the death penalty," and there was no "acquittal." *Id.* at 157.[5]

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[5] Both *Poland* and *Rumsey* involved Arizona's capital sentencing procedures, under which the trial judge determines the appropriate sentence. This Court's decision last Term in *Ring* v. *Arizona*, 122 S. Ct. 2428 (2002), invalidates the Arizona scheme insofar as it allows the trial judge rather than a jury to determine the existence of aggravating factors required by Arizona law for imposition of the death penalty. The Court found that aspect of the Arizona scheme to be inconsistent with *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because it deprives a defendant of his right under the Sixth Amendment to a jury determination of facts that increase the maximum sentence authorized by law. *Ring* holds only that the Sixth Amendment requires a jury to determine the existence of aggravating factors necessary to impose the death penalty, not that the jury must also determine ultimately whether a sentence of death should be imposed. See *Ring*, 122 S. Ct. at 2437 n.4. In any event, *Ring* has no bearing on the conclusion in *Rumsey* and *Poland* that the *Bullington* exception applies only when the decision to impose a sentence of life imprisonment—whether made by a judge or a jury—constitutes an acquittal on the merits on the question whether death is an appropriate sentence for the offense.

C. The Life Sentence Imposed In Petitioner's Initial Trial Was Not An Acquittal On The Merits Of The Death Penalty

The life sentence imposed by the trial court in petitioner's initial trial did not constitute an "acquittal" on whether a sentence of death is appropriate for his offense. The Double Jeopardy Clause therefore does not bar the imposition a sentence of death when petitioner, after obtaining reversal of his conviction on appeal, was again convicted in a retrial.

1. *Neither the jury nor the trial court made a factual determination that a sentence of death is not warranted for petitioner's offense*

An "acquittal" on guilt or innocence entails a decision by the jury or the trial court that the facts in evidence fail to establish the elements of the charged offense. See, *e.g.*, *Sanabria* v. *United States*, 437 U.S. 54, 71 (1978); *United States* v. *Scott*, 437 U.S. 82, 97 (1978); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). By analogy, a "death penalty 'acquittal'" requires the sentencer to render a verdict that the death penalty is not an appropriate punishment, *Rumsey*, 467 U.S. at 209-210; *Bullington*, *supra*, or a court to "find [that] the evidence [is] legally insufficient to justify imposition of the death penalty," *Poland*, 476 U.S. at 157. The jury took no such action in petitioner's initial trial, as it was unable to reach a verdict on a sentence. The trial court likewise made no such determination, as its imposition of a life sentence was non-discretionary and involved no examination of the evidence. Because

petitioner's life sentence was not the result of an "acquittal," it, like most sentencing determinations, raised no double jeopardy bar against resentencing him after a new trial.

a. The jury in petitioner's first capital sentencing hearing was discharged after it was unable to reach a unanimous verdict on the appropriate sentence for his offense. Because the jury failed to reach any verdict at all, it follows necessarily that the jury did not render an acquittal.

This Court's decisions are clear on the point. "A deadlocked jury," the Court "consistently ha[s] recognized, does not result in an acquittal barring retrial under the Double Jeopardy Clause." *Tibbs* v. *Florida*, 457 U.S. 31, 42 (1982). The failure of the jury to reach agreement therefore raised no double jeopardy prohibition against conducting a new capital sentencing proceeding after petitioner was again convicted. See *ibid.*; *Richardson* v. *United States*, 468 U.S. 317, 324 (1984) ("[W]e have constantly adhered to the rule that a retrial following a 'hung jury' does not violate the Double Jeopardy Clause."); *Arizona* v. *Washington*, 434 U.S. 497, 509-510 (1978); *United States* v. *Sanford*, 429 U.S. 14 (1976) (per curiam); *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824).

b. In Pennsylvania, as in most jurisdictions, the inability of a capital sentencing jury to reach agreement on the appropriate sentence results in discharge of the jury and imposition of a non-capital sentence by the trial court. See 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(v) (West 1998); *Jones* v. *United States*, 527 U.S. 373, 419 (1999) (Ginsburg, J., dissenting) (observing that "most States require judge sentencing once a jury has deadlocked" in a "capital penalty-phase proceeding[]"). The trial court's imposition of a life sentence by operation of law in those circumstances, as occurred in petitioner's first trial, is not an acquittal.

A "trial court's ruling in favor of the defendant is an acquittal only if it 'actually represents a resolution, correct

or not, of some or all of the factual elements of the offense charged.'" *Lee* v. *United States*, 432 U.S. 23, 30 n.8 (1977). An acquittal of the death penalty ordinarily entails findings of fact establishing either that no aggravating circumstances exist or that mitigating circumstances exist and outweigh any aggravating circumstances. See *Rumsey*, 467 U.S. at 211 (holding that trial judge's "findings denying the existence of each of the seven statutory aggravating circumstances" was an "acquittal on the merits"). The trial court's imposition of a life sentence in petitioner's first trial, however, resolved no "factual elements" in his favor, *Lee*, 432 U.S. at 30 n.8, and involved no assessment of the evidence or of the existence of aggravating and mitigating circumstances. Instead, the trial court was compelled by operation of law to impose a sentence of life imprisonment, with no discretion in the matter, and without regard to the facts.

This Court's decision in *United States* v. *Martin Linen Supply Co.*, *supra* (see Pet. Br. 25), has no application here. In that case, the jury was deadlocked on whether to convict the defendant, and the trial court, after discharging the jury, granted the defendant's motion for a judgment of acquittal. The Court found that the Double Jeopardy Clause barred further proceedings: the trial court's judgment, because it was based on an "evaluat[ion] [of] the Government's evidence and [a] determin[ation] that it was legally insufficient to sustain a conviction," was an acquittal "in substance as well as form." 430 U.S. at 572. Although here, as in *Martin Linen Supply Co.*, the trial court entered judgment after discharging a deadlocked jury, its judgment was not based on an "evaluation of the evidence" or a "determination that it was legally insufficient" to support a sentence of death. The trial court in fact had no occasion to examine the evidence or to weigh its sufficiency. Its imposition of a life sentence by

operation of law therefore cannot be analogized to a judgment of acquittal.[6]

2. ***That a jury deadlock results in the imposition of a life sentence does not render it an acquittal for purposes of the Double Jeopardy Clause***

Petitioner emphasizes (Pet. Br. 24-26) that, whereas a hung jury on the question of guilt or innocence gives rise to a new trial, a hung jury in a capital sentencing proceeding results in the trial court's imposition of a sentence of life imprisonment. The trial court's entry of a life sentence is a judgment of acquittal, petitioner reasons, because it ends the proceedings in favor of the defendant with the same outcome as a unanimous jury verdict for life. The absence of any factual determination, petitioner contends (*id.* at 26-27), is irrelevant. That argument is without merit.

a. Petitioner assumes that, because the imposition of a life sentence when the jury deadlocks produces the same outcome as a jury "acquittal," the trial court enters a judgment of acquittal when it imposes a life sentence following a hung jury. That a jury deadlock and a jury acquittal both result in the imposition of a life sentence, however, is not significant under the Double Jeopardy Clause. As *Stroud* v. *United States*, *supra*, makes clear, a factual resolution based on a trial-type proceeding is necessary to have an "acquittal" of a greater sentence. Although the jury in Stroud's initial trial elected to impose a sentence of life imprisonment rather than death, and the trial court entered judgment accordingly, the fact that Stroud was sentenced to life imprisonment did not, of its own force, raise a double

[6] Petitioner's reliance on *Smalis* v. *Pennsylvania*, 476 U.S. 140 (1986), see Pet. Br. 26 n.10, is misplaced for the same reasons. In *Smalis*, as in *Martin Linen Supply Co.*, the trial court determined that the evidence was "insufficient to establish [the defendant's] factual guilt." 476 U.S. at 144. Here, the trial court made no factual determination.

jeopardy bar against imposing a sentence of death after his retrial. Instead, Stroud's life sentence carried no double jeopardy consequences because it did not amount to a trial-like "acquittal." *Bullington*, 451 U.S. at 431-432, 439, 446.

Similarly, the imposition of a life sentence on the completion of a sentencing hearing is not, without more, an "acquittal" of the death sentence. See Pet. Br. 29. Instead, an acquittal requires an examination of the evidence and a factual determination that the offense fails to justify the death penalty, see *Poland*, 476 U.S. at 157; *Bullington*, *supra*, and that determination must be made in a trial-type setting, see *Stroud*, *supra*. Here, neither the jury nor the trial court made any factual determination as to the appropriate sentence, and the trial judge's action was a result of a state law rather than a trial-type proceeding. As a result, petitioner's life sentence, like the life sentence in *Stroud*, is subject to the general "clean slate" rule for sentencing determinations. His "legal entitlement" to a life sentence (Pet. Br. 24, 27) came to an end when he obtained reversal of the underlying conviction.

Petitioner's life sentence has the same status under the Double Jeopardy Clause as a life sentence that results when the government, in exchange for a guilty plea, elects to forgo seeking a sentence of death. See *Osborn* v. *Shillinger*, 997 F.2d 1324, 1327-1328 (10th Cir. 1993) (upholding sentence of death on retrial following successful habeas challenge to guilty plea); *State* v. *Hinchey*, 890 P.2d 602, 605-608 (Ariz. 1995) (upholding sentence of death on retrial following post-conviction relief from guilty plea), cert. denied, 516 U.S. 993 (1995) In both situations, the life sentence does not fall within the *Bullington* exception because it does not result from a determination by the sentencer that the evidence fails to justify a sentence of death. See *Osborn*, 997 F.3d at 1327-1328; *Hinchey*, 890 P.2d at 605-608. In both situations, therefore, the defendant has no continuing entitlement to a life

sentence if he obtains reversal of his conviction and is re-convicted.

b. Petitioner also errs in comparing the consequences of a hung jury at trial and at sentencing (Pet. Br. 24-26), and in attaching significance to Pennsylvania's decision to impose a life sentence when the jury deadlocks rather than to convene a new sentencing jury for a new sentencing proceeding. A State's election to conduct only a single capital sentencing proceeding before imposing a default life sentence after a hung jury does not transform the life sentence into an acquittal under *Bullington*.

As discussed, there is no double jeopardy prohibition against conducting a new capital sentencing hearing when the jury deadlocks. Any decision not to do so represents a state policy choice, not a requirement of the Constitution.[7] It follows that there can be no double jeopardy violation when a State elects to hold a new sentencing hearing if the defendant obtains a retrial and is re-convicted. That is precisely what Pennsylvania has done here. Any suggestion that Pennsylvania is barred by the Double Jeopardy Clause from making that choice—and is required to attempt to impose the death sentence at every available opportunity—would imply that Pennsylvania must disadvantage all defendants whose sentencing hearing ends in deadlock in order to preserve the right to conduct a full sentencing hearing if a particular defendant overturns his conviction and thus again faces trial. There is no merit to such an approach. See

[7] In *Jones* v. *United States*, 527 U.S. 373 (1999), this Court decided, as a matter of statutory interpretation, that the Federal Death Penalty Act does not authorize the government to impanel a new jury when a federal capital sentencing jury fails to reach a unanimous verdict. See *id.* at 380-381; see also *id.* at 417-420 (Ginsburg, J., dissenting). There was no suggestion in *Jones*, however, in either the majority or dissenting opinions, that Congress could not provide that authority consistent with the Double Jeopardy Clause.

Monge, 524 U.S. at 734 (declining to "extend the double jeopardy bar" of *Bullington* to *non*capital sentencing proceedings with trial-like protections for defendants because doing so would create disincentives for States to maintain trial-like protections as a matter of legislative grace).

3. *The presence of one or more jurors who would vote to impose a life sentence does not result in a death penalty acquittal*

Insofar as petitioner accepts that an "acquittal" in a capital sentencing proceeding requires a factual determination that the evidence does not justify a sentence of death, he asserts (Pet. Br. 24, 27, 32-33) that the failure of all twelve jurors to agree on a sentence of death amounted to a determination that death is not an appropriate punishment. That contention, the upshot of which is that one juror could render an acquittal, is without basis.

a. The settled rule that a hung jury does not result in an acquittal forecloses petitioner's suggestion that the failure of all twelve jurors to agree amounted to a decision that a sentence of death is unwarranted. It is true (Pet. Br. 24, 27) that the Commonwealth bore the burden of convincing the jury to agree unanimously on a sentence of death. That is also true of the underlying question of guilt or innocence, however, and it is well settled that a trial that results in a divided jury has not produced an acquittal. *E.g.*, *Tibbs*, 457 U.S. at 42. Any conclusion that a capital sentencing proceeding is different—in that one juror's vote for a life sentence results in an acquittal of the death penalty—would "push the analogy on which *Bullington* is based past the breaking point." *Poland*, 476 U.S. at 156.

In any event, Pennsylvania law, in accordance with federal law and the capital sentencing laws of most States with jury sentencing, makes clear that the jury must be unanimous *either* to impose a sentence of death *or* to impose

a sentence of life imprisonment. See *Commonwealth* v. *Jones*, 683 A.2d 1181, 1199 (Pa. 1996) (rejecting as "nonsensical" the argument "that the jury could impose a life sentence in the absence of a unanimous agreement").[8] The jury in this case was instructed accordingly. J.A. 19-20. Its inability to arrive at a unanimous verdict, either for a life sentence or for a sentence of death, thus cannot be characterized as an acquittal. See *Arizona* v. *Washington*, 434 U.S. at 509 ("The argument that a jury's inability to agree establishes reasonable doubt as to the defendant's guilt, and therefore requires acquittal, has been uniformly rejected in this country."). No contrary conclusion is suggested by the fact that, as a result of the jury's deadlock, the trial court was required by operation of law to impose a life sentence. See pp. 16-21, *supra*.[9]

b. The suggestion that one juror could render an acquittal of the death sentence also cannot be squared with this Court's explanation of the role of a capital sentencing jury in parallel statutory schemes. In *Lowenfield* v. *Phelps*, 484

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[8] Under Utah law, although the jury must be unanimous to impose a sentence of death, a majority of ten jurors can impose a sentence of life imprisonment without parole. See Utah Code Ann. § 76-3-207(4)(c) (1999); cf. *Apodaca* v. *Oregon*, 406 U.S. 404 (1972) (unanimous verdict not required in a state criminal case). But the jury in this case was not authorized to render any nonunanimous verdict. See *Commonwealth* v. *Jones*, 683 A.2d at 1199 ("The jury's verdict in the penalty phase of a first degree murder case, whether it be a sentence of life or death, must, just as is true of any verdict in a criminal case, be unanimous.").

[9] Petitioner errs in relying (Pet. Br. 32) on *Schiro* v. *Farley*, 510 U.S. 222 (1994). *Schiro* describes *Bullington* as a "narrow exception" to the clean slate rule, which arises when "requiring a defendant to submit to a second, identical [sentencing] proceeding [is] tantamount to permitting a second prosecution of an *acquitted* defendant." *Id.* at 231 (emphasis added) (citing *Bullington*, 451 U.S. at 446). *Schiro* contains no suggestion that *Bullington* bars a new capital sentencing proceeding on retrial even in the absence of a death penalty "acquittal."

U.S. 231 (1988), the Court upheld against a constitutional challenge the giving of an "*Allen* charge," see *Allen* v. *United States*, 164 U.S. 492 (1896), urging a divided jury in a capital sentencing hearing to reach a unanimous sentencing verdict through further deliberations. The defendant argued that there was no point to achieving unanimity, on the ground that "Louisiana law"—like Pennsylvania law here—"provides that if the jury hangs, the court shall impose a sentence of life imprisonment." *Lowenfield*, 484 U.S. at 238. This Court, however, rejected the suggestion that there was no material difference between a hung jury and a unanimous jury verdict. The Court explained: "The State has in a capital sentencing proceeding a strong interest in having the jury 'express the conscience of the community on the ultimate question of life or death.'" *Ibid.* (quoting *Witherspoon* v. *Illinois*, 391 U.S. 510, 519 (1968)).

Jones v. *United States*, 527 U.S. 373 (1999), is to the same effect. That case involved the Federal Death Penalty Act of 1994, 18 U.S.C. 3591 *et seq.*, which the Court read to require —like the Louisiana law in *Lowenfield* and Pennsylvania's in this case—imposition of a non-capital sentence by the trial court in the event of a jury deadlock. See 527 U.S. at 380-381. The Court rejected the defendant's claim that the jury should have been instructed that its failure to reach a unanimous verdict would result in the imposition of a life sentence. *Id.* at 381-384. That instruction, the Court explained, "has no bearing on the jury's role in the sentencing process." *Id.* at 382. Instead, "it speaks to what happens in the event that the jury is unable to fulfill its role—when deliberations break down and the jury is unable to produce a unanimous sentence recommendation." *Ibid.* In fact, the Court concluded, the requested instruction would tend to undermine the significant interest recognized in *Lowenfield*, *i.e.*, "the strong governmental interest * * * in having the jury render a unanimous sentence recommendation" to

convey the voice of the community on the question of life or death. *Id.* at 383.[10]

By holding, in the context of analogous statutory schemes, that the "jury is unable to fulfill its role" when it "is unable to produce a unanimous sentence recommendation," 527 U.S. at 382, *Jones* and *Lowenfield* rebut the suggestion that one juror's vote for a life sentence amounts to an acquittal. If there were no significance to the distinction between one vote for a life sentence and twelve, there would be little justification for an *Allen* charge. The presence of at least one juror favoring a life sentence would fulfill the jury's function and eliminate the need for further deliberations. Likewise, a defendant could claim entitlement to the instruction denied in *Jones* because the vote of one juror for a life sentence would be relevant to the jury's role. But the Court held that "the proposed instruction has no bearing on

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[10] Although the jury here was instructed that, if the jurors were "hopelessly deadlocked," it would be the judge's "duty to sentence the defendant to life imprisonment," J.A. 18, that instruction did not detract from the court's repeated emphasis on the need for the jury to act unanimously in order to render a verdict, J.A. 15-20. The judge's emphasis on a unanimous jury verdict reflected the State's interest in having the jury, not the judge (by operation of law), determine the appropriate penalty. Cf. *Ring* v. *Arizona*, 122 S. Ct. at 2442 n.6 (including Pennsylvania in list of states that "generally commit [capital] sentencing decisions to juries"). In a decision issued after the initial trial in this case, the Supreme Court of Pennsylvania held that there is no requirement to instruct the jury on the consequences of a deadlock. *Commonwealth* v. *Cross*, 634 A.2d 173, 178 (Pa. 1993), cert. denied, 513 U.S. 833 (1994) (explaining that "[t]his particular section is intended to give guidance to the court in cases where a jury is unable to reach a verdict" and that "a request to have this instruction read" to the jury "would have been denied").

the jury's role," *ibid.*, confirming that there can be no jury acquittal in the absence of a unanimous verdict.[11]

II. THE DUE PROCESS CLAUSE DOES NOT PROHIBIT IMPOSING A SENTENCE OF DEATH AGAINST A DEFENDANT WHO, AFTER BEING SENTENCED TO LIFE IMPRISONMENT, OBTAINS A REVERSAL OF HIS CONVICTION ON APPEAL AND IS AGAIN CONVICTED AFTER A RETRIAL

The Due Process Clause raises no independent prohibition against sentencing petitioner to death after his re-conviction. The core of the "clean slate" rule is that a defendant, after obtaining reversal of his initial conviction on appeal, is subject to an increased sentence if he is again convicted in a retrial. See *Chaffin*, 412 U.S. at 23-35; *Pearce*, 395 U.S. at 720-721. Although the prospect of re-conviction and the

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[11] The jury also did not "implicitly" acquit petitioner. See Pet. Br. 23 (citing *Green* v. *United States*, 355 U.S. 184 (1957)). This Court has found an "implicit acquittal" only when a jury is given the option of convicting on two offenses, one a lesser included offense of the other, and it returns a verdict form convicting on the lesser charge but failing to reflect any decision on the greater charge. See *Price* v. *Georgia*, 398 U.S. 323, 328-329 (1970); *Green*, *supra*. If the jury is released without the defendant's consent, its conviction on the lesser charge is deemed an "implicit acquittal" on the greater charge. See *Green*, 355 U.S. at 190-191. No court has suggested that a hung jury implies an acquittal, however (see p.16, *supra*), and there is no occasion for inferring an acquittal when a jury has made known that it is unable to reach a verdict. See *United States* v. *Bordeaux*, 121 F.3d 1187 (8th Cir. 1997). The nature of the choice facing a capital sentencing jury, in any event, rules out any prospect of an implicit acquittal. This Court requires, as the predicate for implying an acquittal from jury silence, a concurrent conviction on another charge. See *Green*, 355 U.S. at 190 ("When given the choice between finding him guilty of either first or second degree murder it chose the latter."). When a capital sentencing jury is unable to reach a sentencing verdict, however, it fails to make a decision on the only "charge" then before it.

imposition of a more severe sentence might affect the defendant's decision whether to appeal, the "possibility of a higher sentence [is] recognized and accepted as a legitimate concomitant of the retrial process." *Chaffin*, 412 U.S. at 25. Accordingly, the "choice occasioned by the possibility of a harsher sentence, even in the case in which the choice may in fact be 'difficult,' does not place an impermissible burden on the right of a criminal defendant to appeal * * * his conviction." *Id.* at 35; see *Texas* v. *McCullough*, 475 U.S. 134, 143 (1986).

There is one exception to the rule that an increased sentence on retrial is permisible under the Due Process Clause, and it is not applicable here. This Court has "made clear * * * that 'the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of vindictiveness.'" *Alabama* v. *Smith*, 490 U.S. 794, 800 n.3 (1989) (quoting *Blackledge* v. *Perry*, 417 U.S. 21 (1974)); see *Chaffin*, 412 U.S. at 29 (observing that the Court has "intimated no doubt about the constitutional validity of higher sentences [in a retrial] in the absence of vindictiveness"). Where, as in this case, resentencing is conducted by a jury, there is no "real threat of vindictiveness." *Id.* at 28. The jury has "no personal stake in the prior conviction and no motivation to engage in self-vindication." *Id.* at 27. In fact, the jury typically, as was the case here, will have no knowledge of the prior conviction or sentence. See *id.* at 26.[12]

Petitioner does not mention or dispute those established principles. Nor does he challenge the Commonwealth's pro-

[12] There could be no merit to an argument that the Commonwealth's decision to seek a sentence of death in petitioner's retrial was the result of vindictiveness. See *Chaffin* 412 U.S. at 27 n.13 ("No such indication [of vindictiveness] exists on this record since the prosecutor vigorously urged the imposition of the death penalty at the first trial.").

cedures for sentencing him to death in his retrial. He instead asserts (Pet. Br. 34-41) that he held a protected entitlement in the life sentence imposed in his initial trial by operation of law, and that the Commonwealth arbitrarily deprived him of that entitlement when it resentenced him after his retrial. That argument is an outright contradiction of the clean slate rule, however, the basic import of which is that a State *can*, consistent with the Due Process Clause, impose any punishment authorized by law in a retrial. Nothing in Pennsylvania law repudiates that basic authority of the State to seek all available sentences if the defendant overturns the initial judgment by taking a successful appeal. See *Commonwealth* v. *Henderson*, 393 A.2d 1146, 1153-1154 (Pa. 1978) (noting that in cases involving "an increase over the original sentence following retrial secured at the defendant's behest, * * * there has been absolutely no suggestion that the Pennsylvania Constitution provides a more comprehensive protection than that afforded by the Federal Constitution"). To the contrary, Pennsylvania's capital sentencing statute prescribes that "the court *shall* conduct a separate sentencing hearing" after "a verdict of murder of the first degree," with no suggestion that the requirement of a hearing is inapplicable in a retrial. 42 Pa. Cons. Stat. Ann. § 9711(a)(1) (West 1998) (emphasis added).

Petitioner asserts (Pet. Br. 38) that he was not advised that his sentence could increase in a retrial. Pennsylvania law, however, gave him no reason to suppose otherwise, and the clean slate rule supplied the relevant background principle. There is no necessity that the State explicitly preserve the option to resentence in order to avail itself of a power it generally possesses under state and federal law.

Pennsylvania's decision to permit resentencing after a reconviction, but not after a hung jury, is not "arbitrary." See Pet. Br. 38 n.17. When a sentencing jury deadlocks, impaneling a second jury and conducting a new sentencing

proceeding would require retrying much of the case on guilt or innocence. The second jury would come to the sentencing proceeding entirely unfamiliar with the facts of the case or the evidence on the underlying question of guilt, information that is essential to assessing the appropriate sentence for the offense. Selection of a new capital sentencing jury also is a difficult and resource-intensive task. A State reasonably could decide in those circumstances to impose a sentence of life imprisonment instead of convening a new jury and conducting a new sentencing hearing.

The considerations are materially different when the defendant overturns his conviction on appeal and the State obtains another conviction in a new trial. In that situation, the State will have selected a capital jury, and that jury will have intimate familiarity with the case from the retrial on guilt or innocence. A State could decide that those circumstances warrant permitting the jury to consider the full range of sentencing options allowed by law.

In addition, if a State were to hold a capital sentencing hearing on the heels of a hung jury, that proceeding likely would not present the jury with new information relevant to the appropriate sentence. By the time of a retrial following an appeal, however, additional information might well come to light that bears on the sentencing decision. See *Pearce*, 395 U.S. at 723 (observing that, after a re-conviction, the sentencer might have new information "from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources"); cf. *Alabama* v. *Smith*, 490 U.S. 794 (1989) (holding that there is no due process violation in increase of sentence after retrial following defendant's successful appeal to set aside guilty plea because new sentencing information provided at trial justifies the sentence); *Wasman* v. *United States*, 468 U.S. 559, 564 (1984) ("[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics") (quoting *Williams* v. *New York*, 337 U.S. 241, 247 (1949)). That information could provide reason either to seek or to forgo a sentence of death on retrial. This case illustrates the point. Petitioner's sentence of death was based in part on his several intervening convictions for violent felonies. See *id.* at 569-570 ("Consideration of a criminal conviction obtained in the interim between an original sentencing and a sentencing after retrial is manifestly legitimate."); see also *McCullough*, 475 U.S. at 141. For those reasons, Pennsylvania had a rational interest in permitting a new sentencing hearing on retrial, while forgoing one when the initial jury hung.

CONCLUSION

The judgment of the Supreme Court of Pennsylvania should be affirmed.

Respectfully submitted.

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